

Municipal Services Agency
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County of Sacramento

June 23, 2011

Terry Macaulay
Deputy Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: Comments on the Fourth Draft of the Delta Stewardship Council's (DSC) Delta Plan

Dear Ms. Macaulay:

Sacramento County respectfully submits comments and recommendations on the fourth of seven scheduled drafts of the Delta Plan (DP). We commend the DSC staff for its continued commitment to improve and expand the content of the DP. Sacramento County remains concerned with some of the key provisions/assertions related to the geographic authorities and the DP's policies and recommendations that may usurp the local land use and water management decision making.

DSC's Geographic Authority:

Water Code section 12310 defines the Delta as the Sacramento-San Joaquin Delta as described in Water Code section 12220. Other statutory definitions of the Delta are found in Water Code sections 85302(b)¹, 85303². Yet, figure 1-2 (page 20) continues to identify a "Delta Plan Study Area" that extends well beyond the legal Delta and the Suisun Marsh. While the Delta Reform Act (the Act) confers some authority to implement actions outside of the "statutory" Delta, the current draft asserts that because California's water supply reliability and Delta ecosystem concerns are united in the Delta, the Delta Plan must include areas that divert water upstream of the Delta and those areas that receive export water from the Delta.

As indicated in previous comment letters on DP Drafts #2 and #3 (April 15 and May 6, 2011), Sacramento County believes the application of the DP is expressly limited to the Delta, except to the extent that it specifically identifies projects consistent with those statutory authorizations. The authority to extend beyond the Delta is a project-specific authorization, not a global authorization resulting in a significant portion of the State being included within the DP. Nevertheless, the DP seeks to more broadly regulate a host of land use, water management, and ecosystem restoration plans and programs. The County continues to have grave

¹ The geographic scope of the ecosystem restoration projects and programs identified in the Delta Plan shall be the Delta, except that the Delta Plan may include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals.

² The Delta Plan shall promote statewide water conservation, water use efficiency, and sustainable water use.

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concerns about the DSC's perceived statutory authority to implement land use and water management policy over an area far beyond what was statutorily intended by the Legislature.

Governance (Chapter 3)

Covered Actions (page 45, lines 1-6): As described in the Plan, ministerial projects, subject to CEQA (such as building permits, business licenses, and approval of final subdivision maps), are not covered actions, but only if a certification of consistency has already been filed with the DSC for that ordinance or other legal or regulatory provision. This is essentially a meaningless exemption in that otherwise ministerial projects would be subject to a consistency determination unless existing General Plans, land use ordinances, water management and drainage ordinances, and other regulations are independently subjected to a consistency determination. This requirement would re-open local government's adopted plans and ordinances, both at a macro and micro level, under the guise of a consistency determination. The potential for halting, essentially, all projects and programs within the Delta (and possibly beyond) is of significant concern for the County.

Further, as indicated in the preamble to the Water Supply Reliability policies (page 62, lines 32-42), a covered action is de facto inconsistent with the DP if one or both of the following applies:

- The covered action involves the export of water from the Delta or involves the transfer of water through the Delta and the need for the covered action is significantly caused by the failure of one or more water suppliers to comply with policies WR P1, P2 and/or P3;
- The covered action involves the use of water in the Delta and the need for the covered action is significantly caused by the failure of one or more water suppliers to comply with the policies P1, P2 and P3.

These requirements seem to infer that a covered action's consistency is entirely dependent on the actions of a third party water supplier. The next draft of the DP must include specific and understandable guidance as to whom or what agency makes the determination as to whether a water supplier has complied with the specified policies. Sacramento County also recommends the consistency certification process for all ministerial projects be eliminated, or at the very least, the DSC should create a menu of project-types that would be subject to and/or except from consistency review.

Lastly, as defined in Water Code section 85057.5(a)(4), a covered action is a plan, program or project that will have a "significant impact" on the achievement of one of more of the coequal goals. According to the DP, the DSC has determined that "significant impact" means a substantial change in existing conditions that is directly, indirectly, and/or cumulatively caused by a project and that will affect the achievement of one or both of the coequal goals or implementation of government-sponsored flood control programs (page 44, lines 18-33). This determination is problematic as it will subject any effect, no matter how minor, on the achievement of the coequal goals to a project to consistency findings. Such an interpretation is not only too broad, but likely unrealistic to implement over the long term. Sacramento County recommends the DSC re-evaluate their determination and include a new policy action in the next draft that clearly and succinctly defines "significant impact on the coequal goals".

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Certification of Consistency (pages 45-49): The DP acknowledges that “full consistency with all relevant policies may not be possible” (pg 45, lines 31-33). In such cases project proponents will be required to clearly identify areas where consistency is not possible and explain how the covered action “on the whole” is consistent with and/or furthers the coequal goals. However, the DP is absent a discussion (or specific direction) as to how a covered action will be treated if it meets one, but not all, of the goals. For example, if a covered action will enhance and protect the ecosystem, but does not meet/address the goal of providing a more reliable water supply, how does the consistency requirement apply? Similarly, there is no guidance (or recognition of) about the relationship, for purposes of the consistency determination, between the “coequal goals” and the statutory requirement that such goals “shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta.” Case in point, will a proposed covered action be deemed inconsistent even if the local government and/or the DSC deems it necessary to protect and enhance the cultural, recreational and agricultural values of the Delta? Again, the DP is absent a quantifiable performance standard(s) by which the DSC may determine such consistency when, on its face, a covered action is not fully consistent with the proposed policies.

Regarding consistency certification appeals, Water Code section 85225.10 authorizes an appeal from a determination of consistency if the covered action, as a result of that inconsistency, will have a significant adverse impact on the achievement of one of the coequal goals or implementation of government-sponsored flood control programs. This seems to suggest that inconsistency alone is not prohibited, but that there must be some “significant” adverse impact on the achievement of the coequal goals. Therefore, similar to our concern about the DSC’s determination/definition of the term “significant” as it applies to covered actions (discussed on page 2 of this letter), Sacramento County believes it is critical that the next version of the draft DP include a specific policy action or guidance that clearly defines “significant adverse impact” as it will apply to the consistency certification review process.

Incorporation of other/future Plans into the Delta Plan (page 47): The draft DP establishes separate and distinct standards of consistency for “incorporated plans” and “plans not yet incorporated”. As currently described, at time of incorporation, the DSC can decide whether future covered actions must be consistent with both the incorporated plan and some or all of the provisions of the DP or only with the incorporated plan. The process, as described, is somewhat confusing as it appears the DSC is reserving its ability to amend the DP by imposing requirements of another plan in lieu of those in the DP.

Plans not yet incorporated into the DP, at the time of adoption, will also be subject to the consistency certification process. This process applies even if that consistency certification is not successfully appealed, a proponent of a project contemplated by that plan must still file a certificate of consistency with the DSC. As proposed, the DSC will retain the authority to find the specific project inconsistent with the Delta Plan even if the larger plan is consistent with the DP. If a plan is consistent with the DP, smaller projects that are consistent with that larger plan should not be required to file a certificate of consistency, nor should the DSC be able to invalidate the consistency of the smaller project so long as the larger plan under which it falls meets the consistency requirement. To better assist local governments in meeting the plan/project consistency certification test, it is critical that the certification of consistency policy (G P1) be expanded to include clear and detailed guidance and reasonable criteria.

Bay Delta Conservation Plan (BDCP): The DP currently states that the BDCP “will” be incorporated into the Delta Plan if it meets the requirements of Water Code Section 85320 (page 67, lines 2-3). However,

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Sacramento County continues to question the assumption that a completed BDCP must be incorporated into the BDCP. As stated in our April and May 2011 comment letters, the notion that the DP will eventually incorporate the BDCP, or suggestion that it is required to do so, it is not consistent with the statutory scheme. Again, Water Code section 85320(a) merely states that the BDCP “shall be considered for inclusion” in the Delta Plan; it does not require its inclusion. Also, the current draft asserts the DSC retains the authority to find a covered action inconsistent with BDCP, and therefore the DP. This is another example of the DP exceeding its statutory/intended authority. The incorporation of the BDCP should not be the means for the DSC to exercise authority over the BDCP's direction.

Reliable Water Supply (Chapter 5)

WR P2, **Water Reliability Element/Urban and AG Water Management Plans**, page 63): This policy requires water suppliers (Statewide) to prepare plans that account for possible interruption of Delta water supply (for 6, 18, and 36 months). While reducing reliance on the Delta is a key tenet of the Reform Act (Water Code section 85021), it is not clear how this requirement, alone, promotes accountability and achievement of providing a more reliable water supply, one of the coequal goals. To ensure future water management plans (agricultural and urban) sufficiently address this goal, the DP must provide additional guidance and direction, possibly in the form of specific performance standards. Sacramento County recommends the requirements listed on page 64 be expanded to include specific findings that a water supplier could rely upon in determining consistency with this policy.

Risk Reduction (Chapter 7)

The four proposed policies in Chapter 7 are regulatory in nature and will apply to lands within the Delta. Of particular concern are those policies that propose to regulate and/or restrict a host of activities in floodplains (Policies RR P1 and P2, **Floodway/Floodplain Encroachment**, page 136, lines 18-30). These policies, as written, will significantly impact the existing land use/development patterns in the Delta, and more importantly viable and long-standing farming operations. The farming industry in the Delta recognizes the high value of their agricultural land and the need to use it in a wise and efficient manner. In many cases farming operations, and the primary residences, are located within a few feet of the tow of the existing levees. As a result, the DP's encroachment policies must be amended to include provisions that account for existing land uses and farming operations (e.g., grandfathering of conforming uses), and allow for much more flexibility in the regulation of the future/expanded operations.

As a note, it appears the four Risk Reduction policies will apply solely to lands within the Delta, yet some of the nine recommendations are more broad-based and seem to focus on actions that would apply to lands outside the Delta. This emphasis on the policy implementation seems to infer the DSC recognizes that its land and water management authority is, in fact, limited to confines of the statutory Delta, which remains a strong and consistent position/opinion of Sacramento County.

California Delta as an Evolving Place (Chapter 8)

The current draft indicates the DP will rely on local and regional direction to achieve the economic sustainability and fiscal impact mitigation recommendations listed in DP R1, R2 and R3 (page 158). However,

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the Plan is absent specific policies that identify the manner in which the coequal goals will be achieved, while at the same time protecting and enhancing the unique cultural, recreational, natural resource, and agricultural values of the Delta. As you know, protection and enhancement of the socioeconomic framework and well-being of the Delta (and its residents and business owners) is a priority objective for Sacramento County; this position goes back to the crafting the legislative language that lead to the Reform Act. Therefore, the next draft must include both short- and long-term policy actions that will equally balance the achievement of the coequal goals objective with the protection and enhancement of the values and amenities unique to the Sacramento-San Joaquin River Delta (e.g., agriculture, tourism, recreation, and cultural resources).

In closing, Sacramento County appreciates the opportunity to provide comments on Draft #4 of the Delta Plan and we remain committed to continuing to work in a collaborative manner with DSC staff. Sacramento County continues to advocate for a comprehensive land use and water operation/management plan that contains reasonable and implementable policy actions and recommendations that are consistent with the objectives of the Delta Reform Act. We look forward to the release of forthcoming drafts and the accompanying environmental document. Should you have questions about the comments contained herein, please contact Don Thomas, Senior Planner, at (916) 874-5140.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Leonard', with a large, stylized loop at the end.

Robert B. Leonard, Administrator
Municipal Services Agency